BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BRENDA LIPFORD	)	
Claimant	)	
	)	
VS.	)	
	)	
FOOTLOCKER	)	
Respondent	)	Docket No. 1,009,213
	)	
AND	)	
	)	
AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA	)	
Insurance Carrier	)	

ORDER

Claimant appealed the January 24, 2005, Award entered by Administrative Law Judge (ALJ) Bryce D. Benedict. The Appeals Board heard oral argument on July 12, 2005.

APPEARANCES

Jeff K. Cooper, of Topeka, Kansas, appeared for claimant. Michael P. Bandré, of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant alleges injuries to her bilateral upper extremities and right shoulder by a series of accidents through August 29, 2003, her last day worked.[1] The ALJ denied

[1]Claimant's Form K-WC E-1 Application for Hearing filed February 24, 2003, alleges the dates of accident as a "[s]eries through 10/02 & each day worked thereafter" by "[r]epetitive use of upper extremities," with injuries to her "[h]ands, wrists, elbows, shoulders, neck & all related systems." However, claimant's Brief in Support of Her Application for Review, at page 1, states: "This is a claim for bilateral upper extremity injuries caused by claimant's repetitive work activities while working for respondent from October 2002, through her

claimant an award of benefits, finding that claimant's condition was the natural and probable consequence of the injuries claimant suffered in a previous series of accidents.

Claimant contends the ALJ erred and that she has proven that she suffered new and separate bilateral upper extremity injuries and has permanently aggravated her preexisting conditions. Claimant argues she is entitled to a 66.5 percent work disability based upon a 59 percent task loss and a 74 percent wage loss, minus the 16.5 percent preexisting impairment, for a net permanent partial disability of 50 percent.

The parties stipulated to a base average weekly wage of $480. Although average weekly wage was not listed as an issue by the ALJ, claimant contends that her award of compensation should be based upon an average weekly wage of $579.67 by adding to the base wage an average of $62.67 per week of overtime pay and $37 per week as the employer's cost of health, dental and life insurance. During the oral argument to the Board, respondent agreed with claimant that the gross average weekly wage should be $579.67.[2]

Respondent argues that the ALJ's award should be affirmed because claimant did not suffer a new series of accidents and injuries following her return to work after being released from the injuries suffered in docket No. 267,535. Rather, claimant suffered only a temporary flare-up of symptoms from that original injury with no resulting increase in her percentage of functional impairment. In the alternative, should the Board find that claimant suffered a new series of accidents and injuries, respondent contends that claimant is not entitled to a work disability because she was terminated for cause.

Respondent further argues that claimant should be denied a work disability because she failed to make a good faith effort to find appropriate employment following her termination by respondent. In addition, claimant has demonstrated a lack of good faith by voluntarily quitting subsequent employment and thereafter working fewer hours per week, less than full time, at a lower hourly rate of pay. Accordingly, should a wage be imputed to claimant which is less than 90 percent of the average weekly wage she was earning at the time she last worked for respondent, then the Board should impute a wage based upon not less than 40 hours per week at $7 per hour.

Accordingly, the issues for the Board to review are: (1) Did claimant suffer personal injury by accident arising out of and in the course of her employment by a series of accidents beginning October 2002 through August 29, 2003; (2) if so, what is the nature and extent of claimant's injuries and disability; and (3) is respondent entitled to a credit for claimant's preexisting impairment?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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last day worked of August 29, 2003."

[2]See Stipulation filed Dec. 23, 2004.

Having reviewed the entire evidentiary record filed herein, the stipulations of the parties, and having considered the briefs and oral arguments, the Board finds and concludes that the ALJ's award should be affirmed. The ALJ's award sets out findings of fact and conclusions of law that are detailed, accurate, and supported by the record. It is not necessary to repeat those findings and conclusions herein. Accordingly, the Board adopts the ALJ's findings of fact and conclusions of law as its own as if specifically set forth herein.

On May 18, 2004, claimant settled her claim in docket No. 267,535 based upon a 16.5 percent permanent partial disability to the body as a whole. That claim involved a series of work-related accidents ending May 5, 2001, to claimant's bilateral upper extremities, which resulted in four surgical procedures. Claimant had both a cubital tunnel release and a carpal tunnel release surgery to each arm. Claimant was released by the treating physician, Dr. Brad W. Storm, without restrictions, and she returned to her regular job on or about August 1, 2002.

Claimant returned to Dr. Storm on January 23, 2003.

> She has a number of complaints today. One complaint is that in 10/02 she began noticing some increasing numbness and tingling in the left ring and small fingers without any inciting injury or new activity. She denies any problems with numbness and tingling on the median nerve distribution on the left or on any of the fingers on the right. She denies remarkable pain in her neck or pain in her hands with coughing or sneezing. She complains of pain at the base of the right thumb. She complains of some tenderness at the medial elbow on the right. She also complains of bilateral upper extremity tremors that occur frequently by her account. She states that she has gone through the military physicians and states she has had a number of x-rays and she reports that they were negative for any arthritis or any bony abnormalities. She also states she had blood work done that was all negative for rheumatoid arthritis or related diseases by her account. She also states that in 11/02, without any knowledge of an injury, she was unable to extent the DIP joint of her left small finger and that this is tender for her, particularly when she bumps it. She denies any clicking, snapping, or popping or triggering at this point.[3]

Dr. Storm related the numbness and tingling to either scar tissue from the cubital tunnel release or possibly an independent ulnar nerve compression at the wrist. Dr. Storm said that neither the tremor nor the arthritis symptoms were work related. He recommended an EMG.

> If the EMG study reveals compression of the ulnar nerve at the elbow or wrist then I believe further follow up with me would be indicated. Short of this, as I do not believe that I have any surgical options for a work-related injury for her at

[3]Agreed Award, No. 267,535 (May 18, 2004), attached report of Dr. Brad W. Storm, at 1.

> this time, no further follow up with me will be arranged. She can remain on full duty work in the interim.[4]

Claimant was also examined by Dr. Sergio Delgado in connection with her claim in docket No. 267,535. He examined claimant on November 27, 2002. At that time, Dr. Delgado rated claimant as having a 19 percent upper extremity impairment for each upper extremity, which would combine to a 21 percent whole person impairment. He recommended restrictions that claimant "avoid using vibratory tools, avoid repetitive pinching and grasping and should work in a warm environment. She probably should limit her lifting not to exceed 25# repetitively and 35# occasionally."[5] At that time, Dr. Delgado did not believe claimant needed any additional medical treatment.

Dr. Delgado examined claimant again on September 2, 2003. He noted that after her surgeries and return to work, claimant

> developed persistent and worsening of pain symptoms with additional symptoms involving the base of the neck and right shoulder.
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> She received additional diagnostic studies and treatment. Electromyographic studies showed a chronic right ulnar entrapment neuropathy on the right elbow. Surgery was recommended by Dr. Kumar and suggested by Dr. Storm.[6]

At that time, Dr. Delgado's impression was that claimant had "residuals of ulnar neuropathy bilaterally, also sensory in nature. I believe that the positive EMG studies on the right elbow area are related to residuals of the surgery performed. I doubt that any additional surgery will improve conduction studies at this level."[7]

However, Dr. Delgado also believed that after her return to work, claimant did develop a new condition, specifically impingement syndrome of the right shoulder. He did not find any other new injury or condition to claimant's upper extremities, shoulders or neck. Dr. Delgado rated the right shoulder condition as a 6 percent right upper extremity impairment. As of his September 2, 2003, evaluation, Dr. Delgado stated that otherwise his prior upper extremity ratings were still applicable and that there was no need to change the impairment values assigned on November 27, 2002. Dr. Delgado stated that he believed claimant should

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[4]Id. at 2.

[5]Agreed Award, No. 267,535 (May 18, 2004), attached report of Dr. Sergio Delgado (Nov. 27, 2002) at 3; Delgado depo., Ex. 3 at 3.

[6]Agreed Award, No. 267,535 (May 18, 2004), attached report of Dr. Sergio Delgado (Sept. 8, 2003) at 2; Delgado depo., Ex. 4 at 2.

[7]Id. at 4.

> continue with restrictions avoiding repetitive gripping, pinching or repetitive use of both upper extremities, avoid using vibratory tools, working in an environment over 15° and avoid repetitive lifting not to exceed 15#, occasionally 25# and for her right shoulder complaints, she probably should avoid overhead lifting not to exceed 15# occasionally but no lift repetitively.[8]

Although claimant did not work for respondent after August 29, 2003, she returned to Dr. Delgado for another evaluation on June 30, 2004. At that time, Dr. Delgado found a further progression of her injuries, which he attributed to her work with respondent. He rated claimant with a 2 percent upper extremity impairment for the mallet deformity of the left digit of her left hand, and he increased the prior rating to the right upper extremity for a progression of ulnar nerve neuropathy at the elbow. Dr. Delgado recommended the same work restrictions that he had assigned previously.

Claimant was examined by orthopedic surgeon E. Bruce Toby, M.D., on January 16, 2004. Dr. Toby opined that claimant's symptoms were "consistent with the cubital tunnel syndrome and the subsequent surgeries that she had."[9]

> Q. . . . If I were to reflect to you that Ms. Lipford went back to work in August of 2002 after her four surgeries, would it be possible that her symptoms were exacerbated by the return to work?
>
> A. It is possible that movements of the arm certainly could lead to some type of further scarring, but it would seem to me that this would be a continuation of the same problem.[10]

Dr. Toby also described a mass that was found on claimant's upper left arm and suggested surgery may be appropriate for that mass, but he did not state that the condition was work related. He did not diagnose any new condition or impairment to claimant's right shoulder. Dr. Toby also said that a second surgery for the cubital tunnel syndrome was a possibility but that not everyone gets better with a second cubital tunnel procedure. He discussed it with claimant but did not recall whether she was favorable or unfavorable to additional surgery. If claimant were not interested in additional surgery, then he considered her to be at maximum medical improvement. As for restrictions, Dr. Toby thought it was reasonable to return claimant to work without restrictions to see if she could tolerate the work, but if she became symptomatic, which she did, then work restrictions would be appropriate. He did not agree with all of Dr. Delgado's restrictions, however.

In general, the question of whether the worsening of claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers

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[8]Id. at 4.

[9]Toby depo. at 6.

[10]Id. at 7.

compensation turns on whether claimant's subsequent work activity with respondent aggravated, accelerated or intensified the underlying disease or affliction.[11]

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*[12], the Kansas Supreme Court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*[13], the court attempted to clarify the rule:

> The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.

In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig*[14], the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber*[15], the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never

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[11] *See Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 114, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998).

[12] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

[13] *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

[14] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[15] *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 728, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided. The court, in *Graber*, found that its claimant had suffered a new injury, which was "a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back."

Here, the Board finds this circumstance to be more akin to that found in *Gillig*, rather than *Stockman*. Claimant's upper extremity conditions never completely resolved. Although claimant had been released to regular duties by the treating physicians, the pain returned with increased physical activity. The ALJ apparently gave greater weight to Dr. Toby, who attributed all of claimant's present symptoms to her original injury. Even Dr. Delgado opined that most of claimant's current complaints are causally related to her original series of accidental injuries and resulting surgeries.

In situations such as this, there is often a very fine line between what would be described as a new and separate accidental injury versus a natural consequence of the original injury. In this instance, based upon this record, the ALJ found that claimant's condition arose out of her employment but is a natural consequence of the original injury with respondent. The Board agrees and affirms the ALJ's Award.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated January 24, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant

Michael P. Bandré, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director